

1 (Doc. # 1.)

2 Specifically, Plaintiff alleges Defendants carried out “a scheme to deny, impede, delay, and
3 reduce lawful reimbursement to Plaintiff” and a putative class of healthcare providers who rendered
4 services to Defendants’ enrollees. (Doc. # 1 at ¶ 2.) The crux of Plaintiff’s Complaint is that
5 Defendants refuse to pay for more than one service per visit or incident (“bundling”), change submitted
6 claims to billing codes with lower reimbursement rates (“downcoding”), and refuse to reimburse at
7 the proper rate in complex cases (“modifiers”). (*Id.* at ¶¶ 3.a.)

8 **2. Class Certification Discovery**

9 Defendants moved to dismiss Plaintiff’s Complaint on March 19, 2009. (Doc. # 18.) Discovery
10 was stayed until the issuance of the March 5, 2010 order denying Defendants’ motion. (Doc. # 42, Doc.
11 # 53.)

12 A discovery status conference was held before Magistrate Judge McQuaid on May 6, 2010.
13 (Doc. # 68, Doc. # 72 (Transcript).) The court instructed the parties to meet and confer to determine
14 what discovery would need to occur regarding class certification. (Doc. # 72 at 8:2-12.)

15 Subsequently, the parties filed a Joint Report Regarding Scheduling and Discovery. (Doc. #
16 73.) The parties highlighted two issues on which they could not agree: (1) claims data and (2) medical
17 necessity determinations. (Doc. # 73 at 3-4.) Only the claims data issue is relevant for purposes of the
18 instant Order. The parties agreed to brief these issues and have them resolved by the court. (*Id.*)

19 Plaintiff sought a sampling of claims data; that is, the particular claims that healthcare
20 providers submit to Defendants seeking payment for services performed, in order to demonstrate that
21 Defendants’ claims processing policies and practices are standardized, applied uniformly, and routinely
22 harm Plaintiff and class members through downcoding, bundling, and denying modifiers. (Doc. # 73
23 at 5.) Alternatively, Plaintiff agreed to wait until after class certification to receive this claims data if
24 Defendants agreed to stipulate they would not argue at class certification that the absence of proof
25 relating to claims data precludes class certification. (*Id.*)

26 Defendants argued that producing claims data would be extremely expensive and burdensome,
27 and they had already agreed to produce Plaintiff’s own claims data. (Doc. # 73 at 6.) In addition,
28 Defendants argued that Plaintiff had not and could not show how this *individualized* claims data was

1 relevant to class certification. Plaintiff's Complaint alleged that Defendants used an automated system
2 to process all claims, and this system reviews every claim the same way and applies certain "edits" to
3 automatically downcode and bundle specific codes and deny modifiers. (*Id.*) Defendants argued that
4 they did not dispute that they used a system to review every claims and that system applies edits,
5 disclosed the use of this system to Plaintiff, and agreed to produce extensive documentation showing
6 how the system works. (*Id.*)

7 Magistrate Judge McQuaid ordered that class certification discovery would be completed by
8 December 1, 2010, and that class certification briefing would be completed by March 31, 2011, and
9 that he would hold a hearing on September 24, 2010, regarding the claims data issue. (Doc. # 74, Doc.
10 # 83.) The parties submitted briefing, largely reiterating their respective positions as set forth in their
11 joint discovery report. (Doc. # 75-78.)

12 At the hearing, Plaintiff represented that "if defendants produce the documents that they said
13 they would, that documentary evidence, taken together with the upcoming depositions of defendant --
14 defendant's personnel knowledgeable in the categories of claims processing and provider contracts,
15 will enable defendant -- will enable plaintiff to move for class certification." (Doc. # 113 at 3:1-8.)
16 Plaintiff also represented that if he determined he needed more information, he would come back
17 before the court. (*Id.* at 3:9-12.)

18 Importantly, Plaintiff unequivocally represented that Plaintiff did *not* need the claims data to
19 support his class certification motion. Plaintiff stated, "[w]ith regard to these two issues, plaintiff's
20 position-- plaintiff take [sic] the same posture with regard to both the medical necessity issue and the
21 claims processing -- claims data issue, and that is that he doesn't need them to support his class
22 certification motion." (Doc. # 113 at 3:13-18.) This was confirmed by Magistrate Judge McQuaid:
23 "and you make that representation in your papers, and you make it here today, **you're not going to use**
24 **that data to support your motion for class certification. If you don't, then you don't need it.**"
25 (Doc. # 113 at 3:24-25, 4:1-2 (emphasis added).)

26 While Plaintiff represented that he did not need the claims data to support class certification,
27 it was also recognized that if Defendants utilized the claims data, or lack of claims data, in support of
28 their opposition to class certification, Defendants would be told to "halt the proceedings and gird your

1 loins and start your computers running because I'm going to order you to produce that stuff." (Doc.
2 # 113 at 4:1-9.) Plaintiff agreed with this course of action. (*Id.* at 4:1-14.) Therefore, Magistrate Judge
3 McQuaid decided to hold the claims data issue in abeyance to "see what occurs during the class
4 certification process." (*Id.* at 7:9-12.) Magistrate Judge McQuaid specifically instructed Plaintiff's
5 counsel, "if you--when you see their opposition if you think that you need that information, I mean,
6 just file a one-page document, renewal and request for that, and we'll have a hearing, and you'll get
7 that order." (*Id.* at 7:13-16.)

8 On agreement of the parties, Magistrate Judge McQuaid extended the class certification
9 discovery deadline to March 1, 2011, and ordered that class certification briefing was to be completed
10 by June 30, 2011. (*See* Doc. # 85.) Magistrate Judge McQuaid made clear that in his order approving
11 the stipulation, "THERE SHALL BE NO FURTHER EXTENSIONS GRANTED." (*Id.*)

12 **3. Class Certification**

13 Following extensive briefing, a hearing on Plaintiff's class certification motion was held before
14 the Hon. Robert C. Jones, Chief United States District Judge, on September 27, 2011. (Doc. # 111,
15 Doc. # 114 (Transcript).) After hearing argument, the court indicated its intention to deny the Motion
16 for Class Certification (Doc. # 87) and Defendants' Motion to Exclude Opinions of Stephen Foreman
17 for Purposes of Class Certification (Doc. # 88). (Doc. # 111, Doc. # 114.)

18 Judge Jones issued a written Order denying Plaintiff's Motion for Class Certification on
19 October 7, 2011. (Doc. # 115.) Judge Jones identified the class sought to be certified by Plaintiff as
20 follows: "All providers who are, or were, participating providers in the provider networks of
21 [Defendants] in the state of Nevada at any time during the period from December 19, 2002 to present."
22 (Doc. # 115 at 5-6 (citing Pl.'s Mot. for Class Certif. (Doc. # 87) at 1).) Judge Jones identified the
23 gravamen of Plaintiff's claims as follows: "Defendants reimbursed Plaintiff and putative class
24 members at an improperly low rate under the Agreement due to downcoding and bundling." (Doc. #
25 115 at 6.)

26 Judge Jones found that Plaintiff had not shown numerosity because Plaintiff had not
27 demonstrated that the approximately 900 physicians who have agreements with Defendants have
28 suffered the same downcoding or bundling determinations by Defendants. (Doc. # 115 at 6.) Judge

1 Jones characterized the flaw in Plaintiff's allegations, as far as class certification is concerned, as
2 follows: "he has alleged the numerosity of persons who *may have been* harmed, but not the numerosity
3 of persons who *have been* harmed[,]" and failed to "at least *allege* that the same act or acts by the
4 defendant has caused the same harm to a sufficiently numerous class of persons[,]" which would
5 require allegations "that such-and-such number of doctors with substantially similar agreements were
6 subjected to such-and-such particular improper downcodings and/or bundlings." (*Id.* at 7.)

7 Judge Jones similarly determined that Plaintiff did not meet the commonality requirement
8 because Plaintiff failed to provide "evidence that other doctors suffered the same precise downcodings
9 or bundlings" to allow the court to "compare the standard logic used to process reimbursement claims
10 against the Agreement and statute, respectively, and determine whether the use of the logic violated
11 either, thereby determining the claims of many doctors 'in one stroke.'" (Doc. # 115 at 8.) The flaw
12 once again, was Plaintiff's failure to "allege how many doctors were subjected to which particular
13 improper downcodings and bundlings." (*Id.* at 9.)

14 With respect to typicality, Judge Jones found that Plaintiff failed to show that the particular
15 downcoding and bundlings suffered by him were also suffered in common by a sufficiently numerous
16 class. (Doc. # 115 at 12.)

17 **4. Motion for Production of Claims Data**

18 On the same day that the Judge Jones indicated his intent to deny Plaintiff's Motion for Class
19 Certification, Plaintiff filed the instant motion seeking production of the claims data. (Doc. # 112.)

20 **B. SUMMARY OF ARGUMENT**

21 **1. Plaintiff's Motion (Doc. # 112)**

22 Plaintiff's motion seeks the "immediate production" of claims data for the Class Period of
23 December 19, 2002, to the present in order to satisfy his burden under Rule 23 with respect to class
24 certification in light of the District Court's October 7, 2011 Order (Doc. # 115). (Doc. # 112 at 1-2.)
25 Plaintiff argues that he is entitled to the claims data at this stage of the proceedings because of the
26 discovery order entered by Magistrate Judge McQuaid on September 24, 2010. (*Id.* at 1.) Plaintiff
27 further asserts that while he believes he has met the Rule 23 standards for class certification, to the
28 extent Judge Jones's order denying class certification indicates that additional evidence is necessary,

1 he requests what he styles as the “immediate production” of such data. (*Id.* at 2.)

2 Preliminarily, the court points out that other than referencing the September 24, 2010 discovery
3 hearing before Magistrate Judge McQuaid, Plaintiff does not identify the particular request for
4 production under which he seeks production of the claims data. There is no question that Plaintiff’s
5 motion can be characterized as a discovery motion since Plaintiff titles it “Plaintiff’s Motion Pursuant
6 to Magistrate Judge’s Discovery Order.” (Doc. # 112.) Local Rule 26-7(b), governing discovery
7 motions, provides, “[d]iscovery motions will not be considered unless a statement of the movant is
8 attached thereto certifying that, after personal consultation and sincere effort to do so, the parties have
9 been unable to resolve the matter without Court action.” L.R. 26-7(b). While Plaintiff asserts that
10 Defendants have refused in the past to produce the claims data, he has not provided the requisite
11 statement certifying a good faith effort to resolve this particular issue in connection with the pending
12 motion.

13 While Plaintiff has not styled his motion as a motion to compel discovery, likely because the
14 class certification discovery deadline has long since passed, it has the indicia of a motion to compel.
15 Under Local Rule 26-7(a), “[a]ll motions to compel discovery...shall set forth in full the text of the
16 discovery originally sought and the response thereto, if any.” L.R. 26-7(a). Plaintiff has not complied
17 with this provision.

18 In fact, not only does Plaintiff’s motion (Doc. # 112) fail to set forth the text of the particular
19 discovery request at issue, Plaintiff makes no mention of a specific request for production. (*Id.*) In his
20 Reply, Plaintiff does indicate that the claims data was requested in connection with Plaintiff’s First
21 Request for Production of Documents (Doc. # 121 at 3:12); however, Plaintiff again fails to point to
22 any specific discovery request. Later on in Plaintiff’s Reply, Plaintiff states that he “should be granted
23 discovery of the Defendants’ claims data responsive to the Data Discovery Requests attached hereto.”
24 (*Id.* at 4:27-5:1.) Plaintiff includes a footnote referencing Plaintiff’s 30(b)(6) November 2011 Notice
25 to Defendants of Videotaped Deposition Relating to Electronic Claims Data and Production of
26 Threshold Information, identified as Exhibit A to Plaintiff’s Reply, as well as the Request for
27 Production of Documents Relating to Claims Data, identified as Exhibit B to Plaintiff’s Reply. (*Id.*
28 at 5 n. 1.) Plaintiff indicates that these discovery requests were served on Defendants on

1 November 3 and 4, 2011. (*Id.*)

2 While footnote 1 in Plaintiff's Reply refers to Exhibit A, this exhibit is actually a copy of
3 Plaintiff's Petition for Leave to Appeal from Order Denying Class Certification Pursuant to Rule 23(f).
4 (*See* Doc. # 121 Ex. A.) Attached to the Petition are Exhibits A-H, filed in support of the Petition.
5 (*Id.*) Since the exhibits to the Petition are identified alphabetically (A-H), it would have been helpful
6 to the court if Plaintiff had identified the exhibits to his Reply numerically. Regardless, Exhibit A is
7 *not* the deposition notice that Plaintiff refers to in his Reply. (*See* Doc. # 121 at 5 n. 1, Ex. A.)
8 Exhibit A to the Petition, is a copy of Judge Jones's Order on class certification. (*Id.* at Ex. A to Ex.
9 A.)

10 Exhibit B to the Petition is a copy of Plaintiff's Memorandum in Response to Defendants'
11 Memorandum in Support of Defendants' Proposed Discovery Plan. (Doc. # 121 at Ex. B to Ex. A.)
12 Exhibit B to the Reply (not to be confused with Exhibit B to Exhibit A to Plaintiff's Reply) is the
13 transcript of the videotaped deposition of Tricha Hutchcraft. (Doc. # 121 Ex. B.) Neither of these
14 documents are the documents referenced in footnote 1 of Plaintiff's Reply.

15 As it turns out, the deposition notice and accompanying request for production of documents
16 are actually set forth at Exhibits D and C, respectively to Plaintiff's Reply. (Doc. # 121 Ex. C, Ex.
17 D.)

18 Having identified the actual exhibits Plaintiff contends relate to the request for claims
19 production data, *i.e.*, Exhibits C and D to his Reply, the court is puzzled with how Plaintiff is now
20 seeking the production of documents in connection with discovery that was served *after* the close of
21 class certification discovery. (*See* Doc. # 121 Ex. C, Ex. D, indicating the deposition notice and
22 request for documents were served on November 4, 2011.) Plaintiff's discovery motion is tied to the
23 September 24, 2010 discovery conference held by Magistrate Judge McQuaid, and therefore, this
24 deposition notice and request for production of documents, served in November 2011, have no
25 relevance to Plaintiff's motion.

26 Finally, on page six (6) of Plaintiff's Reply, he states that the claims data was sought in
27 connection with Request Number 29 of Plaintiff's First Request for Production of Documents. (Doc.
28 # 121 at 6:22-26.) Plaintiff identifies the discovery request as being set forth at Exhibit E to his Reply.

1 (Doc. # 121 Ex. E (and not Exhibit E to Exhibit A to the Reply).)

2 After undertaking a thorough review of the docket in this action, the court ascertained that
3 Plaintiff previously tied the claims data to Plaintiff's First Request for Production, Request Numbers
4 8, 20, 21, 27, 28, 29, and 34. (*See* Doc. # 73 (Pl.'s position in the Joint Report Regarding Scheduling
5 and Discovery).) It is unclear why Plaintiff represented earlier on in the action that the claims data was
6 requested in Request Numbers 8, 20, 21, 27, 28, 29 and 34, but now only identifies Request Number
7 29. In any event, Plaintiff should have identified the specific request and set forth the language of the
8 request in full in his moving papers. *See* L.R. 26-7(a).

9 Plaintiff has also filed a Petition for Leave to Appeal from Order Denying Class Certification
10 Pursuant to Rule 23(f) with the Ninth Circuit Court of Appeal. (Doc. # 119.)

11 **2. Defendants' Opposition (Doc. # 118)**

12 Preliminarily, the court notes that Defendants style their brief as an Opposition to Plaintiff's
13 Motion for *Additional Discovery* in Support of Denied Motion for Class Certification. (Doc. # 118
14 (emphasis added).) Defendants argue that Plaintiff is really trying to resurrect his attempt at class
15 certification. (*Id.* at 2:23-26.) Defendants assert that until the denial of the motion for class
16 certification, Plaintiff did not move for production of the claims data he now seeks. (*Id.* at 2:15-16.)

17 Defendants argue that Plaintiff is not entitled to further discovery because: (1) Plaintiff had
18 nineteen (19) months to conduct discovery regarding class certification prior to the March 1, 2011
19 discovery cutoff and prior to the September 27, 2011 class certification hearing; (2) during class
20 discovery, Plaintiff represented that he did not need the claims data of other providers that he now
21 seeks and Defendants did not rely on the claims data in its opposition to class certification; (3) Plaintiff
22 seeks claims data for all of Defendants' participating providers, not just those who suffered the same
23 alleged injury; (4) Plaintiff failed to identify any per se improper edits applied to his claims; and
24 (5) production of claims data for providers other than Plaintiff would be extremely burdensome and
25 expensive. (Doc. # 118.)

26 **3. Plaintiff's Reply (Doc. # 121)**

27 Plaintiff responds to Defendants' opposition by arguing: (1) Plaintiff had far less time than
28 Defendants represent to conduct discovery because it was stayed until March 5, 2010, and even then,

1 Defendants continued to obstruct discovery; (2) Plaintiff requested the claims data as far back as when
2 he served his First Request for Production of Documents on Defendants in July 2010, and Defendants
3 used the lack of claims data to oppose class certification when they argued that Plaintiff's expert did
4 not conduct an analysis of the claims data showing the impact on the class; (3) denial of class
5 certification was premised not on Plaintiff's failure to identify *per se* improper edits, but on a failure
6 to demonstrate a class-wide impact, which can only be shown through use of the claims data;
7 (4) Defendants did not produce Plaintiff's own claims data, and even if they did, they do not explain
8 how that would enable Plaintiff to determine which and how many other providers have suffered
9 downcoding and bundling; and (5) Defendants have grossly overstated the burdensomeness of
10 producing the claims data. (Doc. # 121.) In support of his reply, Plaintiff filed the Declaration of his
11 expert, Stephen Foreman, PhD, JD, MPA. (Doc. # 122.)

12 **4. Defendants' Sur-Reply (Doc. # 126)**

13 Defendants argue that Plaintiff still fails to identify the specific edits applied to his own
14 reimbursement claims he asserts were *per se* improper, and therefore, cannot possibly define a class
15 of other physicians who had the same improper edits applied to their claims. (Doc. # 126 at 2-7.)
16 Defendants also contest Plaintiff's claim that they obstructed discovery, and maintain that production
17 of the claims data would be burdensome and expensive. (Doc. # 126 at 7-10.)

18 **5. Plaintiff's Sur-Reply (Doc. # 127)**

19 Plaintiff argues that Defendants do not dispute that a showing of class-wide impact can only
20 be made through the use of class-wide data. (Doc. # 127 at 2-3.) Plaintiff again asserts that Defendants
21 did not produce all of the data Plaintiff needed to make his required showing. (*Id.* at 3.) Plaintiff
22 further argues Defendants misrepresent the conduct of discovery in this action, and that they
23 disregarded the testimony of their own Rule 30(b)(6) witness regarding the ease of producing the
24 claims data. (*Id.* at 3-6.)

25 **II. DISCUSSION**

26 For the reasons set forth herein, the court exercises its discretion to deny Plaintiff's request for
27 production of the claims data.

28 ///

1 **A. TIMELINESS**

2 Under Rule 26, a party “may obtain discovery regarding any nonprivileged matter that is
3 relevant to any part’s claim or defense[.]” Fed. R. Civ. P. 26(b)(1). However, the court *must* limit
4 discovery if it determines “the party seeking discovery has had ample opportunity to obtain the
5 information by discovery in the action[.]” Fed. R. Civ. P. 26(b)(2)(C)(ii). For the reasons set forth
6 below, the court finds that Plaintiff had ample opportunity to obtain the claims data and his effort to
7 seek this discovery at this stage in the proceeding is untimely.

8 The discovery cutoff for class certification was initially set for December 1, 2010. (Doc. # 74.)
9 Pursuant to an agreement between the parties, Magistrate Judge McQuaid subsequently extended the
10 deadline to March 1, 2011. (Doc. # 85.) The order extending class certification discovery reads,
11 “THERE SHALL BE NO FURTHER EXTENSIONS.” (*Id.*)

12 In seeking discovery at this late juncture, Plaintiff relies on Magistrate Judge McQuaid’s
13 comments at the September 24, 2010 discovery hearing that he would hold the claims data issue in
14 abeyance to see what occurs during the class certification process.

15 Magistrate Judge McQuaid’s comment that he would re-visit the claims data issue if it became
16 pertinent to the class certification proceedings cannot be viewed in a vacuum. In other words, the time
17 period for possible discovery of the claims data was not unlimited in duration. Magistrate Judge
18 McQuaid was clear that class certification discovery was to be completed by March 1, 2011.
19 (Doc. # 85.) Because the class certification discovery extension was granted *after* the hearing on the
20 dispute regarding discovery of the claims data, the inescapable conclusion is that *all* class discovery
21 was to be completed by March 1, 2011. Moreover, the scheduling order itself mandated that class
22 certification discovery be completed even before briefing began on the class certification motion. (*See*
23 Doc. # 85.)

24 Therefore, if Plaintiff wanted to utilize claims data in connection with class certification, he
25 was required to complete such discovery on or before March 1, 2011. Plaintiff failed to pursue
26 discovery of the claims data within the prescribed time frame. Instead, Plaintiff now seeks production
27 of the claims data because Judge Jones denied his motion for class certification. (*See* Doc. # 130 at
28 20:24-25, 30:1-5.)

1 Alternatively, and even though the order indicated no further extensions would be granted,
2 Plaintiff could have sought an extension of the class certification discovery deadline. In light of
3 Magistrate Judge McQuaid's comment that he would likely permit such discovery if Plaintiff
4 determined Defendants were going to use the claims data to oppose class certification, this would have
5 been the most reasonable course of action. Plaintiff did not file a motion to reopen discovery.

6 Plaintiff's motion suggests that instead of setting a firm deadline for the completion of class
7 certification discovery, a "floating" deadline was put into place, such that Plaintiff could seek
8 additional discovery in the event his class certification motion was denied. This was simply not
9 contemplated by any discovery order or Magistrate Judge McQuaid's comments at the discovery status
10 conferences.

11 Plaintiff's argument that he should be allowed to conduct claims data discovery at this point
12 because Magistrate Judge McQuaid's stated that production of the data would not be required until it
13 became clear it was pertinent to class certification (Doc. # 121 at 5) is unavailing. Magistrate Judge
14 McQuaid never ruled that production of the claims data would be *required*. Instead, he expressly tied
15 production of claims data to Defendants' use of the claims data in opposition to class certification.
16 (See Doc. # 113 at 7:9-16.) Moreover, Magistrate Judge McQuaid made clear that the reason he was
17 not requiring the production of the claims data was because Plaintiff represented that *he did not need*
18 *it* to support class certification, and therefore it was unnecessary. (Doc. # 113 at 3:23-25, 4:1-9.)

19 Plaintiff's argument that he "*sought and was denied*" the claims data discovery is not
20 convincing. (See Doc. # 121 at 3 (emphasis original).) Plaintiff asserts that his First Request for
21 Production of Documents sought the production of the claims data, and "Defendants refused to
22 produce such data[.]" (*Id.* at 6.) In reality, Plaintiff initially sought the claims data, and then
23 represented that he *did not need it for class certification*. (See Doc. # 113 at 3:23-25, 4:1-2, 13-14.)
24 Plaintiff concedes as much now because he still maintains that this information was not necessary for
25 class certification. (Doc. # 121 at 8 ("it was not in fact necessary for Plaintiff to do an analysis of
26 individual claims data for the entire class at the class certification stage[.]").) Again, Magistrate Judge
27 McQuaid confirmed this with Plaintiff's counsel, stating, "you're not going to use that data to support
28 your motion for class certification. If you don't, then you don't need it." (Doc. # 113 at 4:1-3.)

1 If Plaintiff wants to adopt the position that he sought and was denied production of the claims
2 data, his remedy under the Federal Rules of Civil Procedure was to seek an order compelling
3 production of the claims data. Plaintiff failed to do so. Instead, and importantly, he represented to the
4 court that he did not need the claims data.

5 The court also points out that Magistrate Judge McQuaid was clear that Plaintiff could move
6 to seek this information if he discovered Defendants were utilizing it in their *opposition* to class
7 certification. (See Doc. # 113 at 4:3-9, 7:13-16.) Defendants initially filed their opposition to Plaintiff's
8 motion for class certification on May 17, 2011. (Doc. # 89.) They also filed their motion to exclude
9 the opinions of Plaintiff's expert, Stephen Foreman, on the same date. (Doc. # 88.) Plaintiff now
10 argues that Defendants did try to use the failure to analyze the claims data as part of their opposition
11 to class certification in the context of their motion to exclude Plaintiff's expert. (Doc. # 121 at 8, Doc.
12 # 113 at 8:23-25; 9:1-10.)

13 The court finds this position troubling, if in fact Defendants' motion to exclude Plaintiff's
14 expert's opinions constituted use of the claims data. Instead of filing a motion to reopen discovery to
15 compel production of the claims data at that point, Plaintiff waited until after the class certification
16 hearing, when Judge Jones indicated his intent to deny class certification, to seek production of the
17 claims data. While Plaintiff points out that he did raise the issue in his opposition to Defendants'
18 motion to exclude Foreman's opinions (see Doc. # 130 at 9:11-19, referencing Doc. # 90 at 22)², he
19 did not file a motion seeking to reopen discovery or file a motion for production of the data at that
20 time, as he was instructed to do by Magistrate Judge McQuaid. (See Doc. # 113 ("if you--when you
21 see their opposition if you think that you need that information, I mean, just file a one-page document,
22 renewal and request for that, and we'll have a hearing, and you'll get your order.")) Apparently
23 Plaintiff still did not think he needed the claims data as he did not file the "one-page document."

24 Moreover, Plaintiff's position is inconsistent because he still maintains that the claims data
25 was not necessary for class certification. (Doc. # 90 at 22; Doc. # 119 (Petition appealing the class
26 certification order).) Plaintiff candidly admits that the only reason he seeks the data now is because

27 ² Counsel referenced page 19 of the brief, which is page 23 of the docketed version. (See Doc.
28 # 90.)

1 he believes that it is required pursuant to Judge Jones's order. (Doc. # 130 at 29:24-25, 30:1-5.) While
2 the court appreciates that Plaintiff did not think he needed the claims data to proceed with class
3 certification, that was a strategic decision Plaintiff chose to make.

4 In addition, Plaintiff argues that Defendants did not produce seven years of Plaintiff's own
5 claims data, as they represent, somehow depriving Plaintiff of the ability to analyze this data for
6 purposes of class certification. (Doc. # 121 at 14.) If Plaintiff believed that Defendants did not produce
7 what they were supposed to, with respect to Plaintiff's own claims data, again, his remedy was to file
8 a motion to compel *prior to* the close of class certification discovery. Plaintiff did not do so, and
9 therefore, he cannot now use that as a basis for an order for production of the claims data at this stage
10 in the proceeding.

11 To the extent Plaintiff argues that he is entitled to production of the claims data because the
12 Supreme Court issued its opinion in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), in the
13 middle of the class certification, the court also finds this argument unavailing. Even if Plaintiff thought
14 that *Dukes* required analysis of the claims data for class certification (Doc. # 121 at 9) (Plaintiff takes
15 the opposite position), Plaintiff should have sought an order reopening discovery at that point. In fact,
16 Judge Jones issued an order on June 27, 2011, after the Supreme Court issued its opinion in *Dukes*,
17 inviting further briefing. (Doc. # 97.) In his supplemental brief, Plaintiff argued that *Dukes* does not
18 significantly alter the analysis of the class certification motion. (Doc. # 105.) Plaintiff claimed that
19 he could show commonality by demonstrating the existence of a pattern and practice applied to the
20 processing of claims submitted by providers for services rendered to Defendants' subscribers. (*Id.* at
21 4.) While Plaintiff noted the procedural history surrounding the claims data issue (*id.* at 10 n. 1), he
22 did not indicate that he thought production of the claims data was required for class certification
23 pursuant to *Dukes*. Instead, he continued to maintain that the claims data was not required for class
24 certification. (*Id.* at 10.)

25 Another point worth noting is that Plaintiff places much weight on his argument that
26 Defendants relied on the claims data in connection with their motion to exclude the opinions of
27 Plaintiff's expert, but Judge Jones denied that motion. In fact, Plaintiff does *not* contend that
28 Defendants raised the claims data in their opposition to the *class certification motion*. The court

1 surmises this is because Plaintiff's motion is really predicated on the outcome of the class certification
2 hearing. (*See* Doc. # 121 at 13:7-8 ("The only way for Plaintiff to identify which providers were
3 subjected to which edits would be for Plaintiff to *examine and analyze the claims data.*") (emphasis
4 original).)

5 In sum, if Plaintiff intended to use the claims data, Plaintiff should have sought production of
6 the data prior to the court-imposed class certification discovery deadline of March 1, 2011. At the very
7 least, Plaintiff should have sought an extension of the class certification discovery deadline prior to
8 its expiration, or sought to reopen discovery after receiving Defendants' motion to exclude Plaintiff's
9 expert in connection with class certification.

10 **B. IMPACT ON EXPERT DISCOVERY**

11 The parties also agreed on, and the court ordered, corresponding extensions of the deadlines
12 for expert reports. (*See* Doc. # 85.)

13 Presumably, the expert reports have been completed. If Plaintiff's request to reopen discovery
14 for production of the claims data were granted, Plaintiff represents that his expert would need to
15 analyze the data and provide further evidence concerning certification. (*See* Doc. # 112 at 3, Doc. #
16 130 at 59:3-12.) Logically, discovery would also have to be re-opened with respect to experts. This
17 would cause considerable delay. The court does not believe that Magistrate Judge McQuaid envisioned
18 opening the floodgates of discovery after expiration of the class certification discovery deadline, and
19 certainly not after the hearing on class certification.

20 **C. BURDEN & EXPENSE**

21 Rule 26 provides that the court *must* limit discovery when "the burden or expense of the
22 proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in
23 controversy, the parties' resources, the importance of the issues at stake in the action, and the
24 importance of the discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(C)(iii).

25 Defendants argue the burden and expense of producing the claims data is unwarranted. (Doc.
26 # 118, Doc. # 126.) Specifically, Defendants contend this additional discovery would encompass
27 production of claims data dating back to December 2002, involving some four million reimbursement
28 claims, and encompassing millions of pages of documents. (Doc. # 118 at 12, Ex. 1 (Decl. of Steven

1 Visser).) This would require engaging an outside consultant to extract the millions of claims from its
2 data warehouse and prepare them for production. (*Id.*) Defendants estimate the cost of this production
3 as approximately \$62,000. (*Id.*) This is in addition to attorneys' fees and costs associated with
4 production, as well as the burden on Defendants' staff. (*Id.*) Moreover, Defendants argue that the
5 consultant's work would not be able to proceed until counsel identify and agree upon the relevant data
6 to be produced, which includes identification of the precise scope of claims for which data will be
7 obtained, the specific data elements to be obtained, and the format and media of the data. (*Id.*)

8 Plaintiff disputes Defendants' cost estimates and assert that Defendants would only be required
9 to reproduce the files for Defendants, and Plaintiff would be able to interpret them. (Doc. # 121, Doc.
10 # 122 (Decl. of Stephen Foreman), Doc. # 127.) Plaintiff's expert, Stephen Foreman, concludes that
11 extraction of the four million claim lines would take a few hours at most. (Doc. # 122 at ¶ 9.)

12 At the hearing on this motion, Plaintiff's counsel conceded that she would also have to depose
13 Defendants' Rule 30(b)(6) witness regarding the information technology pertaining to how the claims
14 data is organized and how it can be analyzed. (Doc. # 130 at 59:1-12.) Plaintiff's counsel also indicated
15 that his expert would like Defendants' "Data Dictionary" to be able to navigate Defendants' files. (*Id.*
16 at 60:7-11.)

17 The precise amount it would cost to produce the claims data is disputed by the parties. What
18 is clear, however, is that production of the claims data will likely involve considerable burden and
19 expense. This is evidenced by the manner in which Plaintiff has specified that Defendants produce
20 such data in their Request for Production of Documents. (*See* Doc. # 121-3 (Ex. E).) Plaintiff's First
21 Request for Production of Documents is prefaced with eight (8) instructions and twenty-six (26)
22 definitions. (*Id.*)

23 The court has no doubt that the production of claims data will not be as simple as Plaintiff
24 suggest, *i.e.*, "Defendants, copy your files to a hard drive, and give them to Plaintiff." In addition, the
25 amount of additional attorney's fees and costs incurred by Defendants would be significant, and the
26 time and effort required of Defendants' staff to effectuate the production would be considerable.

27 Moreover, production of the claims data would undoubtedly lead to additional discovery
28 disputes, briefing, hearings, extensions of the discovery deadline, that would result in further delay of

1 this case.

2 In sum, the court finds that Plaintiff's request for production of the claims data at this stage of
3 the proceedings would be unduly burdensome and expensive.

4 **D. RELEVANCY**

5 As set forth above, Judge Jones denied class certification because Plaintiff had not established
6 numerosity, commonality, and typicality. (*See* Doc. # 115.) With respect to numerosity, Judge Jones
7 found that Plaintiff had not demonstrated that the approximately 900 physicians who have agreements
8 with Defendants have suffered the same downcoding or bundling determinations by Defendants. (Doc.
9 # 115 at 6.) Judge Jones characterized the flaw in Plaintiff's allegations, as far as class certification
10 is concerned, as follows: "he has alleged the numerosity of persons who *may have been* harmed, but
11 not the numerosity of persons who *have been* harmed[.]" and failed to "at least *allege* that the same
12 act or acts by the defendant has caused the same harm to a sufficiently numerous class of persons[.]"
13 which would require allegations "that such-and-such number of doctors with substantially similar
14 agreements were subjected to such-and-such particular improper downcodings and/or bundlings." (*Id.*
15 at 7.)

16 Judge Jones similarly determined that Plaintiff did not meet the commonality requirement
17 because Plaintiff failed to provide "evidence that *other doctors* suffered the *same* precise downcodings
18 or bundlings" to allow the court to "compare the standard logic used to process reimbursement claims
19 against the Agreement and statute, respectively, and determine whether the use of the logic violated
20 either, thereby determining the claims of many doctors 'in one stroke.'" (Doc. # 115 at 8 (emphasis
21 added).) The flaw once again, as noted by Judge Jones, was Plaintiff's failure to "allege how many
22 doctors were subjected to which particular improper downcodings and bundlings." (*Id.* at 9.)

23 With respect to typicality, Judge Jones found that Plaintiff failed to show that the particular
24 downcoding and bundlings suffered by him were also suffered in common by a sufficiently numerous
25 class. (Doc. # 115 at 12.)

26 The court finds some merit in Defendants' argument that Plaintiff's request for the claims data
27 is the proverbial "fishing expedition" because Plaintiff has yet to even identify the specific edits that
28 he alleges were *per se* improper as to him, and seeks claims data for all of Defendants' providers, not

1 just those who suffered the same alleged injury. (Doc. # 118 at 5-12.) Judge Jones was clear that
2 Plaintiff had to “show that the particular downcodings and bundlings suffered in common by a
3 sufficiently numerous class were the same as those he himself suffered.” (Doc. # 115 at 12.)

4 The court is concerned with how interpretation of diagnostic (ICD) codes or Current Procedural
5 Terminology (CPT) codes for providers outside of Plaintiff’s specialty will overcome the shortcoming
6 addressed by Judge Jones. Defendants point out that there are some 7,000 separate CPT codes utilized,
7 only a limited number of which apply to Plaintiff’s specialty of pediatrics. (Doc. # 118 at 8.)
8 Moreover, different types of providers perform different services, and therefore, submit different CPT
9 codes for reimbursement. (*Id.*) Therefore, according to Defendants, Plaintiff has no basis to seek
10 claims data with respect to those providers who do not even utilize the same reimbursement codes.
11 (*Id.*)

12 Judge Jones’s Order specifically states that Plaintiff failed to “identify subclasses of doctors
13 who were allegedly cheated under specific ClaimCheck algorithms in order for common issues to
14 predominate over individualized issues for any particular subset of doctors.” (Doc. # 115 at 12-13
15 (citing *Klay v. Humana*, 382 F.3d 1241, 1263, 65 (11th Cir. 2004).) Without specific subclasses for
16 each healthcare specialty covered by Defendants’ plan, the discovery of all claims data appears
17 irrelevant under the analysis of the District Court’s Order.

18 Thus, in view of Judge Jones’s order denying class certification, the court is skeptical that even
19 if Plaintiff were permitted to undertake the claims data discovery he seeks, he would achieve the goal
20 of class certification.

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III. CONCLUSION

Because the proposed discovery is untimely, will require the reopening of expert discovery and further delay of this case, is unduly burdensome and expensive, and likely irrelevant, and because Plaintiff has not complied with Local Rule 26-7, Plaintiff's motion (Doc. # 112) is **DENIED**.

IT IS SO ORDERED.

Dated: January 13, 2011.


WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE